



Date: December 19, 2000
BALCA Case No.: 1997 INA 033
Certifying Officer Case No.: P96-MD-33410

In the Matter of:

ATUL PUROHIT,
Employer,

on behalf of

DEOKIBAI SHROFF,
Alien.

Certifying Officer: R.E. Panati, Region III.

Appearance: R.B. Marasigan, Esq., of Washington, D. C.,
for the Employer and Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that Atul Purohit ("Employer"), filed on behalf of Deokibai Shroff ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, and the Employer requested reconsideration and administrative judicial review.¹

¹ The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training

STATEMENT OF THE CASE

On September 27, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Cook" for this household. The job was classified as "Cook, Domestic Service" under DOT Occupational Code No. 305.281-010.² The Application described the job duties as follows:

Prepare, cook & serve Indian cuisine & meals in Indian-American household; prepare & serve Indian dishes, desserts & delicacies during business & social functions in household of Indian-American medical practitioner; purchase groceries & ingredients; clean cooking utensils and kitchen premises.

AF 21, box 13. The Other Special Requirements were, "Non-smoking in workplace & with knowledge of Indian cuisine." *Id.*, box 15. The wage offered was \$10.46 per hour for a forty hour week, with time and a half for overtime, as required. The hours were from 8:00 A.M. to 1:00 P.M., and from 6:00 P.M. to 9:00 P.M., daily. No educational or training requirement was stated, but the Employer specified two years of experience in the Job Offered or in the Related Occupation of Household Cook. *Id.*, box 14.³

Notice of Findings. The May 6, 1996, Notice of Findings ("NOF") denied certification subject to Employer's rebuttal. AF 17-19. The NOF explained that the position described in the Application was not clearly shown to be a full-time job within the meaning of 20 CFR § 656.3. Although the Application said the Alien would be employed forty hours per week in cooking and related food preparation work, the Employer did not show that the job duties described constituted full-time employment in this household. The NOF then directed the Employer to provide further information and supporting documentation to rebut this finding. In view of the statement by the Alien's former employer, who described the household work she performed while working in India, it is notable that the NOF asked,

Administration of the U. S. Department of Labor.

²305.281-010 **COOK** (domestic ser.) Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.)*GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP: 6 DLU: 81.*

³A national of India, the Alien was born in 1922 and had a "Gen. Education" in India.

Who will perform the general household maintenance duties, such as cleaning, clothes washing vacuuming, etc.? If the alien is currently employed in the household, please state who has performed these duties since [July 1994, the date she was hired by the Employer]?

AF 18-19.

Rebuttal. On April 15, 1996, the Employer filed a Rebuttal which consisted of a cover letter from counsel and a statement by the Employer. AF 10-16. Employer described his household and the meals to be prepared and served by the Cook, and he estimated the time the Cook would require to perform such duties. The Employer admitted that the Cook would have other duties than cooking, however. AF 12-13.

Final Determination. The CO denied certification in the Final Determination issued on July 12, 1996. AF 08-09. After reviewing the NOF and the rebuttal, the CO, citing 20 CFR § 656.3, concluded that the Employer's rebuttal failed to sustain his burden of proof. The CO, noting that Employer's rebuttal indicated that light housekeeping would be performed, concluded that the position was actually for a Houseworker, general (domestic service), for which a new application would need to be filed. AF 09.

Appeal. On August 5, 1996, the Employer requested administrative judicial review of the denial of certification in the Final Determination.⁴

DISCUSSION

In *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*), the Board held that "the definition of employment in section 656.3 cannot be used to attack the employer's need for the position by questioning the hours in which a worker will actually be engaged in work-related duties. Focusing solely on whether the employment will keep the worker substantially engaged throughout the day casts the problem in the wrong light -- the true issue being whether the employer has a bona fide job opportunity." Slip op. at 4 (footnote omitted). Rather, a CO may correctly apply the *bona fide* job opportunity analysis of 20 C.F.R. § 656.20(c)(8) when it appears that the job was mis-classified as a skilled domestic cook rather than some other unskilled domestic service position, or where it appears that the job was created for the purpose of promoting immigration. See *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

⁴The panel notes that Employer submitted new evidence with his appellate brief. Because that newly proffered evidence was not considered by the CO, the document was not a part of the record upon which the denial was made. 20 CFR §§ 656.26(b)(4) and 656.27(c). For this reason the new evidence cannot be considered in reviewing the denial of certification. *O'Malley Glass & Millwork Co.*, 1988-INA-49 (Mar. 13, 1989); *Universal Energy Systems, Inc.*, 1988-INA-5 (Jan. 4, 1989). Such evidence, however, may be considered by the CO on remand.

In the instant case, the CO properly identified the issue in the Final Determination as whether the position was actually one for a houseworker, general, rather than a domestic cook. The NOF, however, was based solely on a citation of section 656.3. Although the NOF detailed the same types of questions that would be relevant under a section 656.20(c)(8) analysis, given the NOF's limited basis on section 656.3, the case must be remanded⁵ to provide the Employer an opportunity to supplement the record in regard to the issue of whether the position is actually one for a housekeeper or a domestic cook.

Accordingly, this matter will be remanded for issuance of supplemental NOF for reevaluation of the application consistent with the *en banc* decisions in *Uy* and *Schimoler*. See also *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*).

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter **REMANDED** for further development of the case.

JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting

⁵Under the record as it presently exists, this panel would affirm the CO's denial of labor certification. Thus, on remand, Employer must come forward with additional, credible evidence establishing that it has a *bona fide* position for a domestic cook rather than a general houseworker.

full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.